

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SILVANO ACOSTA)	
Claimant)	
VS.)	
)	Docket No. 248,168
MONFORT, INC.)	
Respondent,)	
Self-Insured)	

ORDER

The respondent appealed the November 15, 1999 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

This is a claim for an August 27, 1999 accident and resulting groin and low back injuries. After conducting a hearing on November 15, 1999, the Judge ordered the respondent to pay temporary total disability benefits.

The respondent contends the Judge erred by entering the preliminary hearing Order before it had taken and presented the depositions of two of claimant's supervisors. The respondent contends that it has been denied due process and its right to present evidence as provided by K.S.A. 1998 Supp. 44-534a.

The only issue before the Board on this appeal is whether the Judge erred by denying the respondent's request to continue the preliminary hearing until it had the opportunity to present the deposition testimony of two of claimant's supervisors.

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. On August 27, 1999, Mr. Acosta injured his groin and low back while working for Monfort, Inc. Mr. Acosta immediately reported the accident to the company nurse and was referred to the company doctor, Myron J. Zeller, M.D.
2. Mr. Acosta saw Dr. Zeller on September 2, 1999, and was placed on light duty that included a one-pound lifting restriction and only occasional bending and stooping.

The doctor diagnosed a lumbar strain and left groin strain.

3. Despite his injuries, Mr. Acosta continued working for Monfort, Inc., but his work restrictions caused conflict with one of his supervisors, Mr. Rey Camacho. On September 18, 1999, Mr. Camacho sent Mr. Acosta home and several days later Mr. Acosta was terminated.

4. Mr. Acosta saw Dr. Zeller on September 23, 1999. The doctor then restricted Mr. Acosta from all lifting and bending. Dr. Zeller continued those restrictions on September 30, 1999, and referred Mr. Acosta to William Dodson, M.D., for additional evaluation.

5. On September 28, 1999, Mr. Acosta's attorney, Mr. Seth G. Valerius, wrote Monfort, Inc., advising the company that Mr. Acosta was seeking workers compensation benefits because he had been fired after taking his work restrictions to his supervisor, Mr. Camacho. Mr. Valerius wrote, in part:

When I interviewed my client he advised me that Dr. Zeller gave him work restrictions of no lift, pull, push, carry of 0 pounds at anytime. He indicates that he took his work restriction to his supervisor, Mr. Camacho, who started to yell at him and eventually fired him. Please review your personnel file as I will be investigating this matter for possible retaliatory discharge and/or Americans with Disability [sic] Act violations. Please reinstate my client's employment within his work restrictions. If my client is not reinstated to a light duty job within seven (7) days an Application for Hearing will be filed pursuant to Kansas law.

According to the copy of the September 28, 1999 letter filed with the Division, a copy of that letter was also sent to Monfort's attorney, Mr. Terry Malone.

6. Likewise, the Division's records indicate that on October 6, 1999, Mr. Valerius sent Mr. Malone, among other documents, a copy of the "Certification Pursuant To K.S.A. 44-534a As Amended." That document stated unequivocally that Mr. Acosta was seeking either reinstatement of his light duty job or temporary total disability benefits. The document read, in part:

. . . As noted, claimant specifically requested reinstatement of his employment to light duty work or temporary total disability benefits.

As the September 1999 letter and the October 1999 certificate indicate, Mr. Acosta was requesting temporary total disability benefits because he had been fired from his light duty job.

7. On November 15, 1999, the parties appeared before Judge Fuller upon Mr. Acosta's request for a preliminary award of temporary total disability benefits. At the conclusion of Mr. Acosta's testimony, Mr. Malone stated that he wished to present

testimony from two of Mr. Acosta's supervisors and that he objected to the Judge entering an order before that evidence was presented.

8. Despite Monfort's objection, the Judge entered the preliminary hearing Order on November 15, 1999. But in deference to Monfort's objection, the Judge delayed the start of the temporary total disability benefits to November 15, 1999.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.

2. The Workers Compensation Act provides that employers have the right to present evidence at preliminary hearings on disputed issues. But the Act also provides that preliminary hearings are summary in nature and that preliminary hearing orders must be issued within five days of the hearing's conclusion.¹ Although most preliminary hearings are short and only take a fraction of the day, the Judge has the discretion to continue the hearing for the taking of additional evidence.

3. Monfort, Inc., contends that it was denied its right to present evidence at the preliminary hearing. The Appeals Board disagrees. Knowing that it had terminated Mr. Acosta and knowing that he was now requesting temporary total disability benefits, Monfort, Inc., chose to attend the preliminary hearing without any witnesses.

4. Monfort's argument that it has been denied the opportunity to present evidence is disingenuous. At the conclusion of Mr. Acosta's testimony, Judge Fuller stated that Monfort knew that Mr. Acosta was requesting temporary total disability benefits because he had been fired and that the company could have presented its evidence by deposition. The Appeals Board agrees.

5. The Appeals Board concludes that Monfort had the opportunity to present its evidence by either depositions taken before the preliminary hearing or by having its witnesses appear at the hearing. Mr. Malone's statement to the Judge that he "had no notice that they were claiming that his termination was anything but appropriate" must have been made during a temporary memory lapse as Mr. Valerius' September 28, 1999 letter specifically mentioned the phrases "retaliatory discharge" and "Americans with Disability [sic] Act violations" when referring to the termination.

6. Considering the above, the Appeals Board concludes that Monfort, Inc., was not denied an opportunity to present evidence in this proceeding.

7. In its brief to the Appeals Board, Monfort, Inc., complained that Mr. Acosta failed to present medical evidence that he was temporarily and totally disabled. Because this is an appeal from a preliminary hearing order, the Appeals Board's jurisdiction is limited

¹ K.S.A. 1998 Supp. 44-534a.

to reviewing the following findings, which are deemed jurisdictional:²

- a. Did the worker sustain an accidental injury?
- b. Did the accident arise out of and in the course of employment?
- c. Did the worker provide both timely notice and timely written claim?
- d. Is there any defense that goes to the compensability of the claim?

Also, the Appeals Board may review those preliminary hearing orders when the Judge has exceeded his or her jurisdiction.³

8. The administrative law judges have the jurisdiction at preliminary hearings to determine whether a worker meets the definition of being temporarily and totally disabled. The Appeals Board concludes that finding is not a jurisdictional one that the Board can review from a preliminary hearing order.

9. As provided by the Act, preliminary hearing findings are not final but subject to modification either upon presenting additional evidence at another preliminary hearing or upon a full hearing on the claim.⁴

WHEREFORE, the Appeals Board affirms the November 15, 1999 preliminary hearing Order entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
Terry J. Malone, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director

² K.S.A. 1998 Supp. 44-534a.

³ K.S.A. 1998 Supp. 44-551.

⁴ See K.S.A. 1998 Supp. 44-534a(a)(2).